UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

BENJAMIN FRANK MURRELL
a/k/a Frank Murrell d/b/a
Frank Murrell Steel Service — Case No. 89-10882 K

Debtor

WILLIAM REGLING, INC.

Plaintiff

-vs- — AP 91-1272 K

BENJAMIN FRANK MURRELL
a/k/a Frank Murrell d/b/a
Murrell Steel Service

Defendant

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Attorney for Plaintiff

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Attorney for Debtor-Defendant

This is an Adversary Proceeding commenced by a creditor objecting to the discharge of Benjamin Frank Murrell under 11 U.S.C. § 727(a)(2)(3)(4)(A), and (5). The creditor has sought summary judgment. Due to the posture of this motion, the Court is presented with a novel question. The posture is this: The plaintiff-creditor has presented with its motion, evidence that is clearly sufficient to establish all elements of a section 727 cause

of action but for the element of "wilfulness." Even as to "wilfulness," there is some evidence presented in the creditor's favor.[1] The debtor has totally failed under Rule 56(e) to present affidavits or otherwise set forth specific facts (as to all but a few of the number of independent bases offered by the creditor to sustain an objection to discharge) showing that there is a genuine issue for trial.[2]

The plaintiff insists that it be spared the expense of a trial as Rule 56 contemplates, since it believes that all of the Rule's requirements have been met. Thus the question presented to the Court is this: Does Rule 56(e)'s direction that "summary judgment, if appropriate, shall be entered against the adverse party" if the adverse party does not appropriately respond to the motion, require a grant of summary judgment denying discharge when proof of wilfulness or of wrongful intent is circumstantial and is presented only in the deposition testimony of the debtor, who has never personally appeared before the Court in these regards?

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[1]Included in the plaintiff's exhibits are the transcript of an examination of the debtor under oath and copies of public and non-public documents addressing the transfers of various properties, real and personal.

[2]The debtor has responded to the Rule 56 motion only with a bare affidavit of counsel, the effect of which is, essentially, to admit numerous of the operative allegations of the creditor, except for fraudulent intent on the part of the debtor. The response also crossmoves for summary judgment dismissing the complaint. That cross motion is hereby denied.

This question must be answered in the negative. As contemplated by Rule 56(d), however, the plaintiff ought not to have to prove at trial any elements other than the debtor's intent.

It is axiomatic that on motion for summary judgment, the Court has a duty to draw all reasonable inferences in favor of the party against whom summary judgment is sought.[3] The principal proof advanced by the creditor is an unsupervised deposition of the debtor. The debtor has not appeared or testified before this Judge on any matter, or before this Court in this Adversary Proceeding.[4] The Court has had no opportunity to observe his demeanor or to ask questions of him. His testimony at the deposition is susceptible of more than one interpretation. The Court could interpret his testimony as manifesting a cavalier attitude, at best, toward the duties of the debtor to honestly report and account for assets at the time that they are required to be disclosed, and during the period that they are property of the estate. But another interpretation of the debtor's testimony is that in the conduct of his bankruptcy he relied heavily, if not exclusively, on the advice

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[3]*Sterling National Bank and Trust Company of New York v. Fidelity Mortgage Investors*, 510 F.2d 870 (2d Cir. 1975).

[4]The debtor presumably testified before another Judge of this Court at the hearing on confirmation of his Chapter 13 plan in 1989; the case converted to Chapter 7 in May of 1991.

of his attorney.[5] There may be other interpretations relating to the debtor's lucidness, intelligence, or comprehension.

Denial of discharge is a harsh and drastic remedy. In this type of litigation it is particularly true that "questions of intent are usually inappropriate for disposition on summary judgment."[6]

This matter shall proceed to trial. Pursuant to Rule 56(d), however, the creditor-plaintiff shall be spared the obligation to further prove any matter which was established by competent evidence in support of its motion and which was not responded to by the debtor with other competent evidence. Only the knowledge intent of the debtor will require litigation at trial. Counsel for the creditor may submit to the Court a proposed list of "facts that appear without substantial controversy," as contemplated by Rule 56(d). He shall provide to the debtor's counsel five days notice of such submission and the debtor may

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[5]The "advice of counsel" defense in objections to discharge under 11 U.S.C. § 727 has been addressed by a number of courts. See for example, *In re Cruickshank*, 63 B.R. 727, 731 (Bankr. W.D.N.Y. 1986) and cases cited therein; *Hibernia Nat. Bank v. Perez*, 124 B.R. 704, 710 (E.D. La. 1991) and cases cited therein; and *In re Kelley*, 135 B.R. 459, 462 (Bankr. S.D.N.Y. 1992).

[6]*National Union Fire Insurance Company of Pittsburgh v. Turtur*, 892 F.2d 199 (2d Cir. 1989). See also *In re Coordinated Pretrial Proceedings*, 538 F.2d 180 (summary judgment is notoriously inappropriate for determination claims in which issues of intent, good faith and other subjective feelings play dominant roles).

thereby raise question as to specific matters thereon. The Court will order that the facts so specified are "deemed established, and the trial shall be conducted accordingly" as specified in the last two sentences of Rule 56(d).

The present Motion is granted in part and denied in part, as set forth above. Trial in this matter is set for December 1, 1992, at 9:00 a.m. (Exhibits to be marked at 8:45 a.m.).

Dated: Buffalo, New York
October 13, 1992

U.S.B.J.